



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2021-0772; FRL-9889-01-R6]

Air Plan Approval; New Mexico; Interstate Transport Requirements for 2010

Nitrogen Dioxide National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve the State Implementation Plan (SIP) revision submitted by the State of New Mexico, through New Mexico Environment Department (NMED) dated June 25, 2021, for the purpose of addressing the Clean Air Act (CAA or “Act”) “good neighbor” interstate transport (prongs 1 and 2) infrastructure SIP requirements for the 2010 1-hour Nitrogen Dioxide (NO₂) National Ambient Air Quality Standard (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by the EPA, commonly referred to as an “infrastructure SIP.” Specifically, the EPA is proposing to approve New Mexico’s June 25, 2021, SIP revision addressing prongs 1 and 2 to ensure that air emissions in the State do not significantly contribute to nonattainment or interfere with maintenance of the 2010 1-hour NO₂ NAAQS in any other state. The EPA is proposing to approve this action pursuant to section 110 and part D of the CAA and the EPA’s regulations.

DATES: Written comments must be received on or before **[INSERT DATE 30**

DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2021-0772, at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from

Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT SECTION**. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

Docket: The index to the docket for this action is available electronically at www.regulations.gov. While all documents in the docket are listed in the index, some information may not be publicly available due to docket file size restrictions or content (e.g., CBI).

FOR FURTHER INFORMATION CONTACT: Ms. Nevine Salem, EPA Region 6 Office, Infrastructure and Ozone Section, 214-665-7222, salem.nevine@epa.gov. The EPA Region 6 office may be closed to the public to reduce the risk of transmitting COVID-19. We encourage the public to submit comments via <https://www.regulations.gov>, as there is a delay in processing mail and no courier or hand deliveries will be accepted. Please call or e-mail the contact listed above if you need alternative access to material indexed but not provided in the docket.

SUPPLEMENTARY INFORMATION: Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

I. Background

On January 22, 2010, the EPA established a new 1-hour primary NAAQS for NO₂ at a level of 100 parts per billion (ppb), based on a 3-year average of the 98th percentile of the yearly distribution of 1-hour daily maximum concentrations.¹ See 75 FR 6474 (February 9, 2010). This NAAQS is designed to protect against exposure to the entire group of nitrogen oxides (NO_x). NO₂ is the component of greatest concern and is used as the indicator for the larger group of NO_x. Emissions that lead to the formation of NO₂ generally also lead to the formation of other NO_x. Therefore, control measures that reduce NO₂ can generally be expected to reduce population exposures to all gaseous NO_x which may have the co-benefit of reducing the formation of ozone and fine particles both of which pose significant public health threats. For comprehensive information on the 2010 1-hour NO₂ NAAQS, please refer to the February 9, 2010 *Federal Register* action. See 75 FR 6474.

Whenever the EPA promulgates a new or revised NAAQS, CAA section 110(a)(1) requires states to submit SIPs meeting the applicable requirements of section 110(a)(2) within 3 years after promulgation of a new or revised NAAQS or within such shorter period as the EPA may prescribe. Section 110(a)(2) requires states to address structural SIP elements such as requirements for monitoring, basic program requirements, and legal authority that are designed to provide for implementation, maintenance, and enforcement of the NAAQS. The EPA refers to the SIP submissions required by these provisions as “infrastructure SIPs.” Section 110(a) imposes the obligation upon states to make an infrastructure SIP submission to the EPA for a new or revised NAAQS, but the contents of individual state submissions may vary depending upon the facts and

¹ Subsequently, after careful consideration of the scientific evidence and information available, on April 18, 2018, EPA published a final action to retain the current NO₂ standard at the 2010 level of 100 ppb. This action was taken after review of the full body of available scientific evidence and information, giving particular weight to the assessment of the evidence in the 2016 NO_x Integrated Science Assessment; analyses and considerations in the Policy Assessment; the advice and recommendations of the Clean Air Scientific Advisory Committee; and public comments. See 83 FR 17226 (April 18, 2018).

circumstances. This proposed rule pertains to the infrastructure SIP requirements for interstate transport of air pollution. These submissions must meet the various requirements of CAA section 110(a)(2), as applicable.²

Section 110(a)(2)(D)(i) of the CAA requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance, of the NAAQS, or interfere with measures required to prevent significant deterioration of air quality or to protect visibility in any other state. This proposed rule addresses the two requirements under section 110(a)(2)(D)(i)(I), which we refer to as prong 1 (significant contribution to nonattainment of the NAAQS in any other state) and prong 2 (interference with maintenance of the NAAQS in any other state). The EPA often refers to SIP revisions addressing the requirements of section 110(a)(2)(D)(i)(I) as “interstate transport SIPs.”

The EPA evaluates each state's interstate transport SIP to see how the state evaluates the transport of air pollution to other states for a given air pollutant; what types of information the state used in its analysis; how that analysis compares with prior EPA rulemakings, modeling, monitoring, and guidance; and what conclusions were drawn by the state. If the EPA concludes that the SIP contains adequate provisions to prohibit sources from emitting air pollutants that significantly contribute to nonattainment, or interfere with maintenance, of a given NAAQS in any other state, we will approve the state's submission with regard to prongs 1 and 2 of CAA section 110(a)(2)(D)(i)(I).

II. State's Submittal

On March 12, 2014, the New Mexico Environment Department (NMED) submitted its Infrastructure SIP to the EPA for the revised 2010 1-hour NO₂ standard. At that time,

² States were required to submit infrastructure SIPs for the 2010 1-hour NO₂ NAAQS to EPA no later than January 22, 2013.

NMED addressed the 2010 NO₂ interstate transport prongs 1 and 2 by referencing the EPA's November 19, 2012 Memorandum³ which outlined the EPA's intention to abide by the August 21, 2012 decision of the U.S. Court of Appeals for the D.C. Circuit, holding that a SIP cannot be deemed deficient for failing to meet the prong 1 and 2 requirements in Section 110(a)(2)(D)(i) before the EPA quantifies the state's obligation. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012). In the March 2014 submittal, the state stated that the EPA had not yet quantified New Mexico's interstate transport obligation under the 2010 NO₂ and therefore New Mexico's infrastructure SIP was adequate for section 110(a)(2)(D)(i)(I).

On April 29, 2014, the U.S. Supreme Court reversed and remanded the D.C. Circuit's *EME Homer City* ruling and upheld the EPA's approach in the Cross-State Air Pollution Rule. *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014). As a result of the Supreme Court reversal, each state was again required to address the interstate transport requirements of 110(a)(2)(D)(i) regardless of whether the EPA had quantified the state's obligation. In accordance with the Supreme Court's decision, on June 25, 2021, the state of New Mexico supplemented its 2010 NO₂ infrastructure SIP to address interstate transport prongs 1 and 2 of Section 110(a)(2)(D)(i), the submission supplements the State's prior 2014 interstate transport SIP for the NO₂ NAAQS.

III. The EPA's Evaluation

A. Evaluation for the 2010 1-Hour NO₂

1. The EPA's General Approach To Evaluating the 2010 NO₂

Unlike certain other NAAQS like ozone and PM_{2.5}, the EPA has not developed a recommended approach for states to use when addressing prongs 1 and 2 for the 2010 NO₂ NAAQS. Following promulgation of the 2010 NO₂ NAAQS, the EPA designated all

³ See "Next Steps for Pending Redesignation Requests and State Implementation Plan Actions Affected by the Recent Court Decision Vacating the 2011 Cross-State Air Pollution Rule," signed by EPA Assistant Administrator Gina McCarthy November 19, 2012. This memorandum is in the docket for this action.

areas of the United States as “unclassifiable/attainment” for this NAAQS because monitors throughout the country had indicated no violations of the NAAQS from 2008-2010.⁴ 77 FR 9532 (February 17, 2012). Additionally, no violations occurred at any monitor in the country in the most recent available design value period of 2018-2020.⁵ For these reasons, 110(a)(2)(D)(i)(I) demonstrations for states have been relatively straightforward because the EPA has not identified areas in any state to which emissions from another state would likely contribute significantly to nonattainment or interfere with maintenance.

2. State’s Submission

In New Mexico’s June 25, 2021, SIP revision, NMED concluded that its SIP adequately addresses prong 1 and 2 with respect to the 2010 1-hour NO₂ NAAQS. NMED provided the following reasons for its determinations: (1) all areas in the United States are designated as unclassifiable/attainment for the 2010 1-hour NO₂ NAAQS; (2) there are SIP-approved and state-only regulations that directly or indirectly control NO_x emissions.

3. The EPA’s Analysis

In addition to the information provided in the SIP, the EPA notes that the highest monitored valid NO₂ design values in each state bordering New Mexico are well below the NAAQS (see Table 1, below), as are the maximum single year 98th percentile values from each neighboring state between 2018-2020 (see Table 2, below). These facts further support the State’s assertion that significant contribution to nonattainment or interference with maintenance of the NO₂ NAAQS from New Mexico is unlikely.

Table 1 – 1-Hour NO₂ Design Values in New Mexico and Neighboring States

State	2018-2020 NO ₂ design value (ppb)
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⁴ For comparison with the 2010 NO₂ 1-hour NAAQS, a three-year design value is used. 40 CFR 50.11(f).

⁵ See <https://www.epa.gov/air-trends/air-quality-design-values#report>. As this report indicates, no regulatory monitor in the U.S. recorded a design value above 80 ppb for the 2018-2020 design value period.

New Mexico	38
Arizona	49
Colorado	52
Oklahoma	26
Texas	32

**Table 2 – Max 98th Percentile NO₂ Concentration
in New Mexico and Neighboring States**

State	Year	Highest Single Year 98 th Percentile Value from 2018-2020 (ppb)
New Mexico	2020	49
Arizona	2018	62
Colorado	2020	71
Oklahoma	2018	41
Texas	2018	69

With respect to prong 2 (interference with maintenance), specifically, in addition to the lack of areas violating the NO₂ NAAQS, there are also no areas in neighboring states approaching a violation of the 2010 NO₂ NAAQS (*i.e.*, 100 ppb) which might therefore be expected to have difficulty maintaining the standard. With respect to both prongs, we also note that there are no areas elsewhere in the United States approaching a violation of the 2010 NO₂ NAAQS.

NMED notified the public with the publication of the notice in both print and online versions of the Albuquerque Journal (in English and Spanish). The public notice provided opportunity for comment and public hearing. NMED did not receive any public comment and no request for public hearing was received. A copy of the New Mexico SIP revision submittal is available online at www.regulations.gov, Docket number EPA-R06-OAR-2021-0772

IV. Proposed Action

Based on our review of New Mexico's June 25, 2021, SIP revision submission, and our analysis of additional relevant information, we propose to determine that emissions from New Mexico will not significantly contribute to nonattainment or interfere with the maintenance of the 2010 NO₂ NAAQS in any other state. Accordingly, we propose to approve the June 25, 2021, New Mexico SIP submission as satisfying the requirements of CAA section 110(a)(2)(D)(i)(I) for the 2010 1-hour NO₂ NAAQS interstate transport prongs 1 and 2. The EPA is soliciting public comments on this proposed action and will consider public comments received during the comment period.

V. Environmental Justice Considerations

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs federal agencies to identify and address "disproportionately high and adverse human health or environmental effects" of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." The EPA further defines the term fair treatment to mean that "no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies."⁶ The EPA is

⁶ <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>

providing additional analysis of environmental justice associated with this action for the purpose of providing information to the public.

The EPA reviewed demographic data, which provides an assessment of individual demographic groups of the populations within New Mexico.⁷ The EPA then compared the data to the national average for each of the demographic groups. The results of the demographic analysis indicate that, for populations within New Mexico, the percentage of people of color (persons who reported their race as a category other than White alone (not Hispanic or Latino)) is significantly higher than the national average (63.8 percent versus 40 percent). Within people of color, the percentage of the population that is Hispanic or Latino is higher than the national averages (49.3 percent versus 18.5 percent) and the percentage of the population that is American Indian/Alaska Native is also higher than the national average (11.0 percent versus 1.3 percent). The percentage of people living below the poverty level in New Mexico is higher than the national average (16.8 percent versus 11.4 percent). The percentage of people over 25 with a high school diploma in New Mexico is slightly below the national average (86.5 percent versus 88.5 percent), similarly, for the percentage with a bachelor's degree or higher education is slightly lower than the national average (28.1 percent versus 32.9 percent).

Communities in close proximity to and/or downwind of industrial sources may be subject to disproportionate environmental impacts of NO₂ emissions. Short- and/or long-term exposure to elevated concentrations of NO₂ may contribute to the development of asthma and may potentially increase susceptibility to respiratory infections. People with asthma, as well as children and the elderly are generally at greater risk for the health effects of NO₂.⁸ However, there are no areas in New Mexico or nationwide that show

⁷ See the United States Census Bureau's QuickFacts on New Mexico at <https://www.census.gov/quickfacts/fact/table/NM,US/PST045221>

⁸ <https://www.epa.gov/air-quality-management-process/managing-air-quality-human-health-environmental-and-economic#what> (URL dated 03/16/2022).

problems attaining or maintaining air quality with regard to NO₂ emissions that may contribute to environmental and health impacts on all populations including minority and low-income population. In addition, the national average of NO₂ concentrations have decreased substantially over the years.⁹ We therefore conclude that this proposed rule will not have or lead to disproportionately high or adverse human health or environmental effects on communities with environmental justice concerns.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

⁹ See <https://www.epa.gov/air-trends/nitrogen-dioxide-trends>

- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and record keeping requirements, Volatile organic compounds

Authority: 42 U.S.C. 7401 *et seq.*

Dated: June 22, 2022.

Earthea Nance,

Regional Administrator, Region 6.

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